TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1883.

No. 263.

THE STATE NATIONAL BANK OF SPRINGFIELD, ILLINOIS, PLAINTIFF IN ERROR,

vs.

THE ST. LOUIS RAIL FASTENING COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ILLINOIS.

FILED JULY 10, 1884.

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JUDD & DETWEILER, PRINTERS, WASHINGTON.

a UNITED STATES OF AMERICA, *ss:*

The President of the United States to the judges of the circuit court of the United States for the southern district of Illinois, Greeting:

Because in the record and proceedings and also in the rendition of the judgment of a plea which is in the said circuit court of the United States for the southern district of Illinois before you, between The St. Louis Rail Fastening Company, plaintiff, and The State National Bank of Springfield, Illinois, defendant, a manifest error hath happened, to the great damage of the said defendant, The State National Bank of Springfield Illinois, as by its complaint appears, we, being willing that the error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the
b record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States of America, at Springfield, in said district, this 29th day of September, in the year of our Lord one thousand eight hundred and eighty-three, and of our Independence the one hundred and eighth year.

[The Seal of the Circuit Court of the United States for the South. Dist. of Ill.]

J. A. JONES,
Clerk of U. S. Circuit Court, South'n Dist. of Ills.

c [Endorsed:] Supreme Court of [the] United States. State National Bank of Springfield, Ills., plaintiff in error, *vs.* St. Louis Rail Fastening Co. Writ of error. Filed Sept'r 29th, 1883. J. A. Jones, clerk.

1 Pleas in the circuit court of the United States of America for the southern district of Illinois, held at the city of Springfield, in said district, before the Honorable John M. Harlan, one of the associate judges of the Supreme Court of the United States, presiding judge, and the Honorable Samuel H. Treat, district judge of said district, on Tuesday, the twentieth day of June, in the June term of said court, in the year of our Lord one thousand eight hundred and eighty-two, and of our Independence the one hundred and sixth year.

J. A. JONES, *Clerk.*

SOUTHERN DISTRICT OF ILLINOIS, *ss:*

ST. LOUIS RAIL FASTENING COMPANY
vs.
STATE NATIONAL BANK. } Assumpsit.

2 The St. Louis Rail Fastening Company, a corporation existing under and by virtue of the laws of the State of Missouri, plaintiff, puts in its place Messrs. Stuart, Edwards and Brown, its attorneys, against The State National Bank of Springfield, Illinois, a corporation doing business under and by virtue of the laws of the United States, defendant, who puts in its place Messrs. Milton Hay and James A. Connolly, its attorneys, in a plea of trespass on the case upon promises.

SOUTHERN DISTRICT OF ILLINOIS, *ss:*

Be it remembered that heretofore, to wit, on the thirtieth day of November, in the year of our Lord one thousand eight hundred and eighty-one, came said plaintiff, by its said attorneys, and filed in the clerk's office of said court its bond for costs herein; which said bond for costs is in the words and figures following, to wit:

Bond for Costs.

SOUTHERN DISTRICT OF ILLINOIS, *ss:*

Circuit Court, United States of America. January Term, A. D. 1881.

3 ST. LOUIS RAIL FASTENING COMPANY
vs.
THE STATE NATIONAL BANK OF SPRINGFIELD, ILLINOIS. } In Assumpsit.

We do hereby enter ourselves security for costs in this cause and acknowledge ourselves bound to pay, or cause to be paid, all costs which may accrue in this action, either to the opposite party or to any of the officers of this court, in pursuance of the laws of this State and of the United States.

Dated this 30th day of November, 1881.

STUART, EDWARDS AND BROWN.

(Indorsed:) Filed November 30, A. D. 1881. J. A. Jones, clerk.

And afterwards, to wit, on said thirtieth day of November, of the year aforesaid, a summons was issued in said entitled cause out of the office of the clerk of said court, directed and delivered to the marshal of said district to execute, which said summons, to-
4 gether with the return of the marshal thereon, is in the words and figures following, to wit:

Summons.

SOUTHERN DISTRICT OF ILLINOIS, *ss:*

Circuit Court of the United States of America.

The United States of America to the marshal of the southern district of Illinois, Greeting:

We command you to summon The State National Bank of Springfield, Illinois, if found in your district, to be and appear before our judges of our circuit court of the United States for the southern district of Illinois, on the first day of the next term thereof, to be held at Springfield, in the district aforesaid, on the first Monday of January next, to answer unto The St. Louis Rail Fastening Company of a plea of assumpsit, to its damage, as it alleges, of five thousand dollars; and have you then and there this writ.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States of America, at Springfield
5 aforesaid, this thirtieth day of November, in the year of our Lord one thousand eight hundred and eighty-one, and of our Independence the one hundred and sixth year.

[L. S.] J. A. JONES, *Clerk*

Executed this writ, as I am herein commanded, by reading the same and by delivering a true copy thereof to S. H. Jones, president of the State National Bank of Springfield, Ill., this 1st day of December, A. D. 1881.

JACOB WHEELER,
U. S. Marshal.

(Indorsed:) Filed December 3rd, A. D. 1881. J. A. Jones, clerk.

Then, afterwards, on the seventh day of December of the year aforesaid, came again said plaintiff, by its said attorneys, and filed in the clerk's office of said court its declaration and copy of warrants sued on; which said declaration and copy of warrants sued on are in the words and figures following, to wit:

6 *Declaration.*

UNITED STATES OF AMERICA, *Southern District of Illinois,* } *ss.*

In the Circuit Court of the U[nited] States. January Term, A. D. 1882.

The St. Louis Rail Fastening Company, a corporation existing under and by virtue of the laws of the State of Missouri, who is and was at the commencement of this suit a citizen of the State of Missouri, plaintiff in this suit, by Stuart, Edwards and Brown, its attorneys, complain of The State National Bank of Springfield, Illinois, a corporation doing business under and by virtue of the laws of the United States, and who is and was at the commencement of this

suit a citizen of Ills. and resident of district aforesaid, defendant in this suit, summoned, etc., of a plea of trespass on the case on promises, for that whereas the said defendant, heretofore, to wit, on the 1st day of November, in the year of our Lord one thousand eight hundred and eighty-one, at the district aforesaid, became and was indebted to the said plaintiff in the sum of five thousand dollars, of lawful money of the United States of America, for divers goods, wares, and merchandise, by the said plaintiff
7 before that time sold and delivered to the said defendant, and at the special instance and request of the said defendant; and, being so indebted to the said plaintiff, the said defendant, in consideration thereof, afterwards, to wit, on the same day and year and at the place aforesaid, undertook and then and there faithfully promised the said plaintiff well and truly to pay unto the said plaintiff the sum of money last mentioned when the said defendant should be thereunto afterwards requested; and whereas also the said defendant afterwards, to wit, on the same day and year, and at the place aforesaid, in consideration that the said plaintiff had before that time, at the like special instance and request of the said dedefendant, sold and delivered to the said defendant divers other goods, wares, and merchandise of the plaintiff, the said defendant then and there undertook and faithfully promised the said plaintiff that the said defendant would well and truly pay to the said plaintiff so much money as the last aforesaid goods, wares, and merchandise, at the time of the sale and delivery thereof, were reasonably worth when the said defendant should be thereunto after-
8 wards requested; and the said plaintiff avers that the said goods, wares, and merchandise last mentioned at the time of the sale and delivery thereof were reasonably worth the further sum of five thousand dollars of like lawful money aforesaid, to wit, at the place aforesaid, whereof the said defendant afterwards, on the same day and year and at the place aforesaid, had notice; and whereas also the said defendant afterwards, to wit, on the same day and year and at the place aforesaid, was indebted to the said plaintiff in the further sum of five thousand dollars of like lawful money as aforesaid, for money before that time lent and advanced by the said plaintiff to the said defendant and at the like request of the said defendant; and in the like sum for other money by the said plaintiff before that time paid, laid out, and expended for the said defendant and at the like request of the said defendant; and in the like sum for other money by the said defendant before that time had and received to and for the use of the said plaintiff; and in the like sum for other money before that time and then due and owing the said plaintiff for interest
9 upon and for the forbearance of divers other sums of money before that time and then due and owing from said defendant to said plaintiff; and in the like sum for the price and value of work then done and material for the same provided by the said plaintiff for the said defendant and at the like special request of the said defendant; and, being so indebted, the said defendant, in consideration thereof, afterwards, to wit, on the same day and year

and at the place aforesaid, undertook and then and there faithfully promised the said plaintiff well and truly to pay unto the said plaintiff the several sums of money in this count mentioned when the said defendant should be thereunto afterwards requested;

And whereas also the said defendant afterwards, to wit, on the day and year last aforesaid and at the place last aforesaid, accounted, together with the said plaintiff, of and concerning divers other sums of money before that time due and owing from the said defendant to the said plaintiff and then and there being in arrear and unpaid; and upon such accounting the said defendant then and
10 there was found to be in arrear and indebted to the said plaintiff in the further sum of five thousand dollars of like lawful money as aforesaid; and, being so found in arrear and indebted to the said plaintiff, the said defendant, in consideration thereof, afterwards, to wit, on the day and year last aforesaid and at the place last aforesaid, undertook and then and there faithfully promised the said plaintiff well and truly to pay unto the said plaintiff the sum of money last mentioned when the said defendant should be thereunto afterwards requested; nevertheless, the said defendant (although often requested, etc.) has not yet paid the said several sums of money above mentioned, or any or either of them, or any part thereof, to the said plaintiff, but to pay the same or any part thereof to the said plaintiff the said defendant has hitherto altogether refused and still doth refuse, to the damage of the said plaintiff of five thousand dollars, and therefore the said plaintiff brings suit, etc.

STUART, EDWARDS & BROWN,
Plaintiff's Attorneys.

(Indorsed:) Filed this seventh day of December, 1881. J. A. Jones, clerk.

11 *Copy of Account Sued on.*

The State National Bank to St. Louis Rail Fastening Co., Dr.

To goods, wares, and merchandise sold and delivered	$5,000
To money lent and advanced	5,000
To money paid, laid out, and expended	5,000
To money had and received to and for the use of said plaintiff	5,000
To money due for interest and forbearance	5,000
To labor, services, and material	5,000
To balance due on account stated	5,000

(Indorsed:) Filed this seventh day of December, 1881. J. A. Jones, clerk.

Copy of Warrants Sued On.

"Check No. 62. Case No. 2105.

In the District Court of the United States for the Southern District of Illinois.

In the Matter of H. SANFORD & Co., Bankrupt.

SPRINGFIELD, ILLS., *May 12th*, 1881.

[Stamp, 2 cents.]

The State National Bank, U. S. depository.

Pay to the order of St. Louis Rail Fastening Co. sixty-four & $\frac{1}{100}$ dollars, being in full for the dividend of $\frac{7}{10}$ per cent. declared
12 April 30th, 1881, on its claim for $8,966.00, proven against said bankrupt's estate, including cost of proof.
$64.01. [In red ink:] 15,463.

M. B. CONVERSE, *Clerk.*"

Countersigned: S. H. TREAT, *Judge*,
Per J. F. C.

[Written across the face in red ink:] Protested for non-payment July 8, 1881.

JAS. F. McNEILL,
Notary Public.

"Check No. 13. Case No. 2105.

In the District Court of the United States for the Southern District of Illinois.

In the Matter of H. SANFORD & Co., Bankrupt.

SPRINGFIELD, ILLS., *May 12th*, 1881.

[Stamp, 2 cents.]

The State National Bank, U. S. depository.

Pay to the order of St. Louis Rail Fastening Co. twenty-two hundred and forty-three dollars, being in full for the dividend of 25 per cent. declared April 30th, 1881, on its claim for $8,966.00, proven against said bankrupt's estate, including cost of proof.
$2,243.00. [In red ink:] 15,486.

M. B. CONVERSE, *Clerk.*"

Countersigned: S. H. TREAT, *Judge*,
Per J. F. C.

[Written across the face in red ink:] Protested for non-payment July 8, 1881.

JAS. F. McNEILL,
Notary Public.

"Check No. 5. Case No. 2105.

In the District Court of the United States for the Southern District of Illinois.

In the Matter of H. SANFORD & Co., Bankrupt.

SPRINGFIELD, ILLS., *May* 12, 1881.

[Stamp, 2 cents.]

The State National Bank, U. S. depository.

Pay to the order of St. Louis Rail Fastening Co. sixty-one
13 $\frac{9}{100}$ dollars, being in full for the dividend of $\frac{33}{100}$ per cent. declared April 30th, 1881, on its claim for $8,966.00, proven against said bankrupt's estate, including cost of proof.

$31.09. [In red ink:] 15,495.

M. B. CONVERSE, *Clerk.*"

Countersigned: S. H. TREAT,
Per J. F. C.

[Written across the face in red ink:] Protested for non-payment July 8, 1881.

JAS. F. McNEILL,
Notary Public.

"Check No. 5. Case No. 2105.

In the District Court of the United States for the Southern District of Illinois.

In the Matter of H. SANFORD & Co., Bankrupt.

SPRINGFIELD, ILLS., *May 12th*, 1881.

[Stamp, 2 cents.]

The State National Bank, U. S. depository.

Pay to the order of the St. Louis Rail Fastening Co. three hundred and fifteen & $\frac{31}{100}$ dollars, being in full for the dividend of 3½ per cent. declared April 30th, 1881, on its claim for $8,966.00, proven against said bankrupt's estate, including cost of proof.

$315.31. [In red ink:] 15,508.

M. B. CONVERSE, *Clerk.*"

Countersigned: S. H. JUDGE [TREAT], *Judge*,
Per J. F. C.

[Written across the face in red ink:] Protested for non-payment July 8, 1881.

JAS. F. McNEILL,
Notary Public.

(Indorsed:) Filed December 7, 1881. J. A. Jones, clerk.

14 Now, afterwards, to wit, on the second day of January, at the January term of said court, in the year of our Lord one thousand eight hundred and eighty-two, the following proceedings were had in said court and entered of record, to wit:

Rule to Plead.

ST. LOUIS RAIL FASTENING COMPANY
v.
STATE NATIONAL BANK. } Assumpsit.

On motion of plaintiff, by Messrs. Stuart, Edwards, and Brown, its attorneys, the defendant having been regularly served with process is ruled to plead herein by Monday, the 9th day of January, inst.

Then afterwards, to wit, on the third day of January, in the year last aforesaid, came said defendant, by its attorney, and filed in the clerk's office of said court its plea herein; which said plea is in the words and figures following, to wit:

15 *Plea.*

STATE NATIONAL BANK OF SPRINGFIELD, ILLINOIS,
ats.
ST. LOUIS RAIL FASTENING COMPANY.

Said defendant, by its attorney, comes and defends the wrong and injury when, &c. It says it did not undertake and promise as said plaintiff in its declaration has alleged, and of this puts itself upon the country.

HAY, *For Deft.*

(Indorsed:) Filed January 3rd, 1882. J. A. Jones, clerk.

Afterwards, to wit, on the thirteenth day of June, in the June term of said court, of the year last aforesaid, the following further proceedings were had in said court and entered of record, to wit:

Order for Hearing.

ST. LOUIS RAIL FASTENING COMPANY
v.
STATE NATIONAL BANK. } Assumpsit.

16 By consent of parties, by their attorneys, this cause is set for hearing on the 16th day of June inst.

And afterwards, to wit, on the twentieth day of June, in the June term of said court, in the year last aforesaid, the following further proceedings were had in said court in said cause and entered of record, to wit:

Judgment.

ST. LOUIS RAIL FASTENING COMPANY
v.
STATE NATIONAL BANK. } Assumpsit.

This day comes as well the plaintiff, by Messrs. Stuart, Edwards, and Brown, its attorneys, as the defendant, by Messrs M. Hay and

James A. Connolly, its attorneys, and the issue joined by consent is tried by the court, a jury being waived, and the court having heard the evidence and argument of counsel, finds the issue for the plaintiff and assesses its damages to the sum of two thousand eight hundred and fourteen dollars and eighty-six cents. It is,
17 therefore, ordered and adjudged by the court that the plaintiff recover of the defendant the said sum of two thousand eight hundred and fourteen dollars and eighty-six cents, its damages aforesaid assessed, together with the said sum of twenty-six dollars and ninety-five cents, its costs and charges by it about its suit in this behalf expended, and that execution issue therefor.

Then, afterwards, to wit, on the thirtieth day of September, in the year of our Lord one thousand eight hundred and eighty-two, a certificate of division was filed in said cause; which said certificate is in the words and figures following, to wit:

Certificate of Division.

Southern District of Illinois, in Circuit Court, of June Term, A. D., 1882.

THE SAINT LOUIS RAIL FASTENING COMPANY
vs.
THE STATE NATIONAL BANK OF SPRINGFIELD. } Assumpsit.

18 Be it remembered that on the trial of the above-entitled cause before the court, the Honorable John M. Harlan, justice, presiding, and the Honorable Samuel *Samuel* H. Treat, district judge, without a jury, which was waived in writing by the parties, the court found the following fact-:

1. That the defendant was appointed depository for the United States district court for the southern district of Illinois about March 1st, 1873.

2. That on March 4th, 1873, George P. Bowen, then clerk of the district court, made the first deposit of funds belonging in the registry of said district court with said bank, and the bank then, by direction of Clerk Bowen, opened an account with "the United States district court for the southern district of Illinois," and entered said deposit to the credit of said court, and that each deposit so made by the clerk was by the bank entered on its books and on the deposit book of the clerk to the credit of the particular case, naming the case, with the number, to which the funds so deposited be-
19 longed; that afterwards, by direction of the clerk, all deposits so made were entered by the bank in the name of "the United States district court for the southern district of Illinois," dropping the name, but retaining the number of the case, as hereinafter specifically set forth.

3. That said clerk continued to make deposit of funds belonging in the registry of said court with said bank up to his death, which occurred in February, 1880, and said bank continued to enter said deposits to the credit of the court in the manner directed by the clerk.

4. That the entries of these deposits were made under direction of the clerk, both on the books of the bank and on the deposit book retained by the clerk, in the following manner, viz:

1873, March 4. To dep. 1971 ..... $1,075 00

* * * * * * *

1874, January 30. To dep. 1425 ..... 225 00

* * * * * * *

1875, January 11. To dep. 1590 ..... 4,619 22

* * * * * * *

1876, January 24. To dep. 1637 ..... 5,200 00

20 5. That at the time each deposit was made the clerk brought to the bank the money to be deposited, together with his depositor's book and a ticket, which would be like the following, differing only as to number, date, and amount:

"STATE NATIONAL BANK,
"SPRINGFIELD, ILLS., *Mar.* 4, 1873.

"Deposited by George P. Bowen, clerk:
"Current funds, No. 1971 ..... $1,075.00."

Whereupon the cashier of the bank would receive the funds and the ticket, and enter in the clerk's deposit book, as well as in the books of the bank, under the account with "The District Court for the Southern District of Illinois," as follows:

1873, Mar. 4.—To dep., 1971, $1,075.00. That the bank understood when these entries were made that the numbers on either side of the account (as No. 1971 above) referred to the case in which the deposit, in the first place, was made, and in which the check, in the second place, was drawn.

6. That case No. 2105 was pending on the bankruptcy side of said court, and during the years 1879, 1880, and 1881 money to the amount of $38,300, realized from the estate of H. Sandford &
21 Co. and belonging in said case, was paid into the registry of the court, and by the clerk, Bowen, and his successor, Converse, deposited with said bank, from time to time, and entered like all other deposits to the credit of said court, each deposit of the items of this fund being accompanied by a ticket from the clerk like the following, differing only as to date and amount, viz:

"STATE NATIONAL BANK,
"SPRINGFIELD, ILLS., *July* 25, 1879.

"Deposited by Geo. P. Bowen, clerk:
"Current funds, No. 2105 ..... $17,000.00."

Said deposit account in said case being in full as follows:

The State National Bank of Springfield, Ills., in Ac. with U. S. Dist. Court, S. Dist. Ills.

1879, July	25.	To dep.,	2105	$17,000 00
Aug.	7.	" "	2105	5,000 00
1880, Jan'y	10.	" "	2105	4,000 00
Oct.	14.	" "	2105	10,000 00
Nov.	12.	" "	2105	2,000 00
1881, Feb'y	25.	" "	2105	300 00

7. That the officers of the bank, on receiving deposits, accompanied by such tickets, understood the "No. 2105" on the
22 ticket to refer to a case of that number in the district court.

8. That the orders drawn by the court on the bank for funds in bankruptcy cases were in the following form, the blanks being filled out to suit each case:

Check No. —. Case No. —.

In the District Court of the United States for the Southern District of Illinois.

In the Matter of —— ——, Bankrupt.

SPRINGFIELD, ILLS., ——— —, 188–.

The State National Bank, U. S. depository.

Pay to the order of —— —— — dollars, being in full for the dividend of — per cent. declared ——— —, 188–, on — claim for $——, proven against said bankrupt's estate.

$——.

—— ——, *Clerk.*

Countersigned:

—— ——, *Judge.*

9. That the checks or orders so drawn and in controversy in this case are as follow:

Check No. 62. Case No. 2105.

In the District Court of the United States for the Southern District of Illinois.

In the Matter of H. SANDFORD & Co., Bankrupt.

SPRINGFIELD, ILLS., *May 12th*, 1881.

The State National Bank, U. S. depository.

Pay to the order of St. Louis Rail Fastening Co. sixty-four & $\frac{1}{100}$ dollars, being in full for the dividend of $\frac{7}{10}$ per cent. declared April 30th, 1881, on its claim for $8,966.00, proven against said bankrupt's estate, including cost of proof.

$64.01.

M. B. CONVERSE, *Clerk.*

Countersigned:

S. H. TREAT, *Judge,*
Per J. F. C.

23 Check No. 13. Case No. 2105.

In the District Court of the United States for the Southern District of Illinois.

In the Matter of HIRAM SANDFORD, Bankrupt.

SPRINGFIELD, ILLS., *May* 12, 1881.

The State National Bank, U. S. depository.

Pay to the order of St. Louis Rail Fastening Co. twenty-two hundred & forty-three dollars, being in full for the dividend of 25 per cent. declared April 30, 1881, on its claim for $8,996.00, proven against said bankrupt's estate.

$2,243.00.

M. B. CONVERSE, *Clerk.*

Countersigned:

S. H. TREAT, *Judge,*
Per J. F. C.

Check No. 5. Case No. 2105.

In the District Courtof the United States for the Southern District of Illinois.

In the Matter of JOSEPH BAILEY, Bankrupt.

SPRINGFIELD, ILLS., *May* 12*th*, 1881.

The State National Bank, U. S. depository.

Pay to the order of St. Louis Rail Fastening Co. thirty-one & $\frac{3}{100}$ dollars, being in full for the dividend of $\frac{33}{100}$ per cent. declared April 30th, 1881, on its claim for $8,8,966.00, proven against said bankrupt's estate, including cost of proof.

$31\frac{3}{100}$.

M. B. CONVERSE, *Clerk.*

Countersigned:

S. H. TREAT, *Judge,*
Per J. F. C.

Check No. 5. Case No. 2105.

In the District Court of the United States for the Southern District of Illinois.

In the Matter of ABNER P. WOODWORTH, Bankrupt.

SPRINGFIELD, ILLS., *May* 12*th*, 1881.

The State National Bank, U. S. depository.

Pay to the order of St. Louis Rail Fastening Co. three hundred and fifteen & $\frac{31}{100}$ dollars, being in full for the dividend of $3\frac{1}{2}$ per cent. declared April 30th, 1881, on its claim for $8,966.00, proven against said bankrupt's estate.

$315.31.

M. B. CONVERSE, *Clerk.*

Countersigned:

J. H. TREAT, *Judge,*
Per J. F. C.

24 10. That said checks were presented at the bank for payment and payment refused, and the checks were protested for non-payment July 8th, 1881.

11. That the funds actually belonging to said case No. 2105, and deposited with said bank in manner aforesaid, were sufficient to pay all checks drawn by the clerk and countersigned by the judge in favor of creditors in said case, including said checks in controversy; the funds so deposited amounting to $38,300.00 as aforesaid, and all checks drawn thereon, including the checks in controversy in this suit, amounting to $33,356.19, leaving a balance to the credit of said case of $4,943.81.

12. That the bank, before the presentation of the checks in controversy, had actually paid out on checks similar to the above, signed by the clerk and countersigned by the judge, and differing only as to number of case, names, dates, and amounts, all the funds ever deposited with it to the credit of the court, many of such checks being drawn, as indicated therein, in cases in which no deposit had been made by the clerk.

25 13. That from the time of the first deposit with said bank, as depository of said court, up to the death of said Bowen, in February, 1880, the bank balanced the account with said court nine different times, returning all the checks to the clerk at each balancing, and entering the case, No., and amount of each check so returned in the depositor's book of the clerk, these balances being struck at the following dates and showing each time the general balance to the credit of the court, as follows, viz:

August 30, 1877	$13,691 57
December 8, 1877	11,024 74
January 5, 1878	7,853 04
January 23, 1879	8,594 00
February 28, 1879	11,466 01
June 2, 1879	27,095 36
August 2, 1879	28,273 82
October 30, 1879	21,244 48
January 10, 1880	32,670 57

14. That the last balancing of said account, showing how it stood when the bank refused to pay the check in controversy, was in July, 1881, when the account showed a balance of $43.13 against the court.

26 15. That the bank always treated the account as an entirety and paid out of it all checks drawn by the clerk and countersigned by the judge until the deposits were exhausted, and in so doing the deposits were exhausted before the drawing and presentation of the checks in controversy, many of such checks so paid having been drawn in cases, as indicated by the numbers, in which no deposit had been made by the clerk.

16. That the bank was never served with a copy of the order of the district court appointing it a depository of the court, but its cashier was orally informed thereof by the clerk of the court, and thereafter the bank acted as such depository, receiving and paying

out money under the orders of the clerk, countersigned by the judge, as above given.

17. That the bank never was furnished with a copy of rule XXVIII in bankruptcy, and had no actual knowledge of the rule.

18. That neither the clerk, Bowen, nor his successor, Converse, presented to the district court at each or any regular session
27 of said court after the defendant was so appointed depository the account and vouchers required by sec. 798, Rev. Stat. U. S.

19. That neither of these clerks made or was required to make at any time after the defendant was appointed depository the monthly report provided for by rule XXVIII in bankruptcy.

20. That the civil and criminal and admiralty cases in the district court are numbered from one consecutively, and the bankruptcy cases are separately numbered from one consecutively, and at the time the deposits in question were made there were two cases numbered 2105 in the district court. There was no evidence that deposits were or were not made in this bank in favor of or checks drawn on any other number 2105 than those drawn in this bankruptcy case.

And the said cause having been heard before the undersigned, John M. Harlan, circuit justice, and Samuel H. Treat, district
28 judge, holding the said circuit court, and we, the said judges holding said court, having found and agreed upon the foregoing facts, were opposed in opinion as to the legal right of the plaintiff to recover on the checks in controversy. Wherefore we certify the said facts and the said division of opinion to the Supreme Court for its determination. And the said John M. Harlan, the presiding justice, being of the opinion that upon the foregoing facts the law of the case is with the plaintiff, judgment is hereby entered for the plaintiff, and this certificate of division, with special findings aforesaid, is ordered to be entered of record.

JOHN M. HARLAN,
Circuit Justice.

S. H. TREAT,
Dist. Judge.

(Indorsed:) Filed September 30, 1882. J. A. Jones, clerk.

Afterwards, to wit, on the twenty-ninth day of September,
29 in the year of our Lord one thousand eight hundred and eighty-three, came again said defendant and filed its bond herein; which said bond is in the words and figures following, to wit:

Bond.

Southern District of Illinois, in Circuit Court.

Know all men by these presents that we, The State National Bank of Springfield, Ill., as principal, and S. H. Jones, as surety, are held and firmly bound unto The St. Louis Rail Fastening Co. in the sum of five thousand dollars, to be paid to the said St. Louis Rail Fasten-

ing Co. or its assigns; for which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, firmly by these presents.

Whereas the said State National Bank of Springfield, Ill., hath prosecuted a writ of error to the Supreme Court of the United States to reverse a judgment rendered in the said circuit court in the case of The St. Louis Rail Fastening Co. against The State National Bank of Springfield, Ill.:

Now, therefore, the condition of this obligation is such that if the above-named State National Bank of Springfield, Ill., shall
30 prosecute its said writ of error to effect and answer all damages and costs if it shall fail to make good its plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

In witness whereof the seal of the said State National Bank is hereto attached by its president, and the hand and seal of said secretary is hereto attached this 29th day of September, A. D. 1883.

[L. S.] S. H. JONES,
Pres't of State Nat. Bank, Springfield, Ills.
S. H. JONES, *Secretary.*

Approved Sept. 29th, 1883.

S. H. TREAT,
Dist. Judge.

(Indorsed:) Filed September 29, 1883. J. A. Jones, clerk.

31 UNITED STATES OF AMERICA, } ss:
Southern District of Illinois, }

I, J. A. Jones, clerk of the circuit court of the United States in and for the southern district of Illinois, do hereby certify the foregoing is a true and complete copy of all the papers filed and proceedings thereon had in a certain cause wherein The St. Louis Rail Fastening Company is plaintiff and The State National Bank of Springfield, Illinois, is defendant, as truly and completely as the same appear of file and record in my said office.

In witness whereof I have hereunto set my hand and seal of said court, at Springfield, in said district this sixth day of October, in the year of our Lord one thousand eight hundred and eighty-three, and of our Independence the one hundred and eighth year.

[The Seal of the Circuit Court of the United States, South. Dist. Ill.]

J. A. JONES, *Clerk.*

32 *Citation.*

Supreme Court of the United States.

The United States of America to the St. Louis Rail Fastening Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error

filed in the clerk's office of the circuit court of the United States for the southern district of Illinois, wherein the State National Bank of Springfield, Illinois, is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties aforesaid in that behalf.

Witness the Hon. S. H. Treat, district judge of the United States for the southern district of Illinois, at Springfield, in said district, this 29th day of September, in the year of our Lord 1883, and of our Independence the 108th year.

S. N. TREAT,
District Judge U. S., South'n Dist. of Ills.

We hereby accept service of this citation October 6th, 1883.
STUART, EDWARDS & BROWN,
For. Def't.

Endorsed on cover: S. Illinois C. C. U. S. No. 263. The State National Bank of Springfield, Illinois, plaintiff in error, *vs.* The St. Louis Rail Fastening Company. Filed 10th July, 1884.

12-21

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, A. D. 1886.

No. 263.

THE STATE NATIONAL BANK, OF SPRINGFIELD, ILLINOIS,
Plaintiff in Error,

vs.

THE ST. LOUIS RAIL FASTENING COMPANY,
Defendant in Error.

BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

MILTON HAY,
HENRY S. GREENE,
SPRINGFIELD, ILL.,
Counsel for Plaintiff in Error.

SPRINGFIELD, ILL.:
H. W. ROKKER, PRINTER AND BINDER.
1887.

Supreme Court

OF THE UNITED STATES.

OCTOBER TERM, 1886.

No. 263.

The State National Bank, of Springfield, Illinois,
Plaintiff in Error,

vs.

The St. Louis Rail Fastening Company,
Defendant in Error.

BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

The amount involved in this particular case is only about $3,000, but there are other cases depending upon the result of this litigation, which, in the aggregate, involve large sums of money. We therefore invoke the close attention of the court to the question herein presented.

ABSTRACT OR STATEMENT OF THE CASE.

The facts involved in this case, as contained in the certificate of division, on pages 9 to 14 of the printed record, may be briefly stated as follows:

1. The State National Bank, of Springfield, Illinois, was appointed a depository for the United States District Court for the Southern District of Illinois, about March 1st, 1873.

2. That on the 4th day of March, 1873, George P. Bowen, the Clerk of said District Court, opened an account with said bank and made a deposit of money, and by direction of said Clerk, the account was entitled,

"STATE NATIONAL BANK OF SPRINGFIELD, ILLINOIS,
In account with
THE DISTRICT COURT OF THE UNITED STATES,
For the Southern District of Illinois."

That for a time each deposit of money, as made, was by the bank entered on its books, and on the deposit book of said clerk, to the credit of the particular case to which the deposit belonged, giving the name and number of the case; but that very soon thereafter, by direction of said clerk, the name or title of the case was omitted, and deposits were made retaining the number of the case only.

3. That said clerk continued so to make deposits to the credit of said court, as above specified, until February, 1880, when he died.

4. That at the time each deposit was made, the clerk brought the money to the bank, together with his depositor's book and a ticket, which would be like the following, except as to number, date and amount:

"STATE NATIONAL BANK,
"Springfield, Illinois, Mar. 4, 1873.
"DEPOSITED BY GEORGE P. BOWEN, CLERK.
"Current funds—No. 1971.....$1,075.00."

Whereupon the cashier of the bank would receive the money and the ticket, and would enter in the clerk's deposit book, as well as on the books of the bank, under the account with "The District Court of the United States for the Southern District of Illinois," as follows:

"1873. Mar. 4. To Dep. 1971—$1,075.00."

5. That the bank understood that the numbers (as 1971 above) referred to the case in which deposits were made or checks drawn.

6. That there was a case pending on the bankruptcy side of said court, during 1879, 1880 and 1881, numbered 2105, and that during said time moneys, amounting to $38,300, belonging to that case, were deposited in said bank, as above described, by Clerk Bowen and his successor, Converse.

7. That the checks or orders drawn by the court, and in controversy in this case, were in the following form, differing only in number, date and amount:

Check No. 13 IN THE DISTRICT COURT OF THE UNITED STATES, *Case No. 2105*
For the Southern District of Illinois.

In the matter of HIRAM SANDFORD, Bankrupt.

Springfield, Ill., May 12th, 1881.

The State National Bank,

U. S. DEPOSITORY.

Pay to the order of ST. LOUIS RAIL FASTENING CO.
twenty-two hundred and forty-three Dollars, being in full for the dividend of 25 per cent. declared April 30th, 1881, on its claim for $8,996.00, proved against said Bankrupt's estate.

$2,243.00 M. B. CONVERSE, *Clerk.*

Countersigned: S. H. TREAT, *Judge.* Per J. F. C.

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8. That checks with same case numbers as above, and amounting to about $2,800, were presented to the bank for payment, and were refused, about July 8th, 1881.

That said fund actually belonged to said case, No. 2105, and deposited with said bank in manner aforesaid, were sufficient to pay all checks drawn by the clerk, and countersigned by the judge, in favor of creditors in said case, including said checks in controversy. The funds so deposited, amounting to $38,300, as aforesaid, and all checks drawn thereon, including the check in controversy in this suit, amounting to $33,356.19, leaving a balance to the credit of said case of $4,943,81.

9. That the bank, before the presentation of the checks in controversy, had actually paid out, on checks similar to the above, signed by the clerk and countersigned by the judge, and differing only as to the number of the case, names, dates and amounts, all the funds ever deposited with it to the credit of the court,—many of said checks being drawn as indicated therein, in cases in which no deposit had been made by the clerk.

10. That from the time of the first deposit with said bank or depository of said court, up to the death of said Bowen, in February, 1880, the bank balanced the account with said court nine

different times, returning all the checks to the clerk at each balancing, and entering the case, number and amount of each check so returned in the depositor's book of the clerk, these balances being struck at the following dates, and showing each time the general balance to the credit of the court, as follows, viz:

August 30, 1877	$13,691 57
December 3, 1877	11,024 74
January 5, 1878	7,853 04
January 23, 1879	8,594 00
February 28, 1870	11,466 01
June 2, 1879	27,095 36
August 2, 1879	28,273 82
October 30, 1879	21,224 48
January 10, 1880	32,670 57

11. That the last balancing of said account showing how it stood when the bank refused to pay the checks in controversy, was in July, 1881, when the account showed a balance of $43.13 against the court.

12. That the bank always treated the account as an entirety, and paid out of it all checks drawn by the clerk and countersigned by the judge, until the deposits were exhausted, and in so doing the deposits were exhausted before the drawing and presentation of the checks in controversy, many of said checks so paid having been drawn in cases as indicated by the numbers, in which no deposits had been made by the clerk.

13. That the bank never was furnished with a copy of Rule 28 in bankruptcy, and had no actual knowledge of the rule.

14. That neither the clerk, Bowen, nor his successor, Converse, presented to the District Court, at each or any regular session of said court, after the defendant was so appointed depository, the account and vouchers required by Sec. 798, Rev. Stat. U. S.

15. That neither of the clerks made, or were required to make, at any time after defendant was appointed depository, the monthly report provided for by Rule 28 in Bankruptcy.

16. That the civil and criminal and admiralty cases in the District Court are numbered from one, consecutively, and the bankruptcy cases are separately numbered from one, consecutively, and, at the time the deposits in question were made, there were two cases numbered 2105 in the District Court. There was no evidence that deposits were or were not made in this bank, in favor of, or checks drawn on, any other number 2105 than those drawn in this bankruptcy case.

Upon the foregoing findings the judgments of the Court was for the plaintiff, accompanied by the following certificate of division:

"And the said cause having been heard before the undersigned, John M. Harlan, circuit justice, and Samuel H Treat, district judge, holding the said Circuit Court, and we, the said judges, holding said Court, having found and agreed upon the foregoing facts, were opposed in opinion as to the legal right of the plaintiff to recover upon the checks in controversy, wherefore we certify the said facts and the said division of opinion to the Supreme Court for its determination. And the said John M. Harlan, the presiding judge, being of the opinion that upon the foregoing facts the law of the case is with the plaintiff, judgment is hereby entered for the plaintiff, and this certificate of division, with special findings aforesaid is ordered to be entered of record."

ERRORS ASSIGNED.

That upon the findings the judgment of the Court should have been for the defendant and not for the plaintiff.

THE QUESTION AT ISSUE.

It is claimed, by defendant in error, that money deposited belonging to case No. 2105 was improperly paid out by the bank, on checks drawn by the court to pay dividends in other cases in which sufficient funds had not been deposited to meet the checks. On the other hand, it is claimed by the bank that the deposits were made *to the credit of the court;* that all checks were drawn by the court against the fund to its credit, and not against a fund to the credit of any particular case; that the bank had the right to presume that the court, as trustee, was in the proper performance of its duty, and that the bank was bound to honor all checks drawn by the court, as such trustee.

In short, the question simply is, what was the duty of the bank in the premises, and has there been a breach of such

duty? For all will admit that, unless the bank has been guilty of the breach of some duty imposed upon it by law it cannot rightfully be held liable in this suit.

It is certainly beyond dispute, that the primary cause of the loss here, which must fall upon some one, was the breach of duty by the clerk, (Bowen), in failing to make the deposit of moneys in his hands belonging to the court. He missappropriated the money which he should have deposited. Had he performed his duty in this respect, the fund on deposit would have been ample to meet all checks drawn by the court in all the cases. There would then have been no necessity for keeping a separate account, by the bank, with each estate, because the amount of the whole fund would have exactly balanced with the total amount of all the checks. There would then have been no occasion for claiming that the bank, an agent of the court for the safe-keeping of its funds held in trust, should have acted as a check upon the court, and should have controlled the application of the fund, even as against the express directions of its principal.

But the clerk, the officer of the court, failed in his duty, and misappropriated the funds. The loss thus occasioned must be borne by some one. The question is, who shall bear it—the bondsmen of the clerk whose misfeasance caused the loss, or the parties in the situation of the defendant in error, or the bank?

Of the bank, it may at least be said, without risk of denial, that it performed its duty faithfully, as it understood it. It kept the money safely—burglars did not break in and carry it off. It was not embezzled or stolen by the bank or its officers. Every cent it received it has accounted for. Every cent

placed in its custody by the court, has been paid out by the order of the same court—not only to the parties to whom the court directed it to be paid, but to parties who were entitled to receive such amounts from the court—parties whose money had passed into the possession of the court as a trust fund to be paid to them, as was done, and who were as much entitled to receive it from the court as defendant in error.

It is evident that if the bank had kept the account, as is now claimed it should have done, the loss would have occurred just the same, except that it would have been transferred to other creditors of the court. The parties who are now suing would have obtained their money, but the other creditors, who have been, it is said, improperly paid — whose money had, in fact, been paid into court in trust for them, and whose equities against the court were, therefore, just as great as those of the defendant in error—would have lost the money to which they were entitled. Their only remedy, it is conceded, would be against the sureties of the defaulting clerk.

Before the court shall hold that the loss must fall upon the bank, it is reasonable to insist that defendant in error shall point out definitely the duty resting upon the bank which has been violated, and whence that duty arose. It is insisted that the duty in question was to keep the account of the money deposited and drawn in each case separate from all others, and to have refused the payment of all checks drawn in any case beyond the amount to the credit of such case. This duty, if it existed, must have arisen either from the manner in which the account was kept, or by force of some rule or law governing such deposits.

We shall next inquire as to whether such duty was imposed by any one of the modes suggested, and if we find that it was not, then we may safely conclude that it did not, in fact, exist.

I.

The duty to keep a separate account did not arise from the manner in which the account was kept by the bank, or directed to be kept by the clerk.

In the first place it is conceded, the manner in which the account was kept by the bank, and the manner in which it was directed to be kept by the clerk, were indentical. It is not denied that the bank in all things followed the directions of the clerk. The clerk, the officer, the arm of the court, the medium through whom the account between the court and the bank was opened, directed from the begining how the business should be conducted, and during its progress repeatedly approved of the course which was pursued. The clerk directed the account to be opened with the District Court, and the funds to be credited to the court, and not to the particular case from which they were derived. We shall see hereafter that the clerk in so doing pursued strictly the mandate of the law. The account was balanced at intervals nine different times, the checks cashed being returned with the balanced books to the clerk, so that he had full knowledge of, and acquiesced in, the manner in which the account was being kept.

It therefore follows that if the duty to keep separate accounts, arose from the manner in which the account was kept, it arose not because of the direction of the clerk, but in

defiance of such directions. To sustain the position it is necessary to insist that, because of the manner in which the account was kept, the bank was chargeable with notice of facts which made it its duty to act in direct opposition to the orders of the court through its officer—that made it its duty to refuse the payment of checks drawn upon a fund in its custody to the credit of the drawer.

In this view of the case, the duties of the bank were not merely to act as a safe depository of the funds of the court, but the bank had an active duty to perform in regard to the distribution of the fund; it was not to permit the court to control the money in its custody, further than to distribute the identical fund received in each case to the distributees of that fund. If the court attempted any other application of the money, then it became the duty of the depository of the court to defy the court and refuse to comply with its demands.

THE MEMORANDA.

The facts which are supposed to have been sufficient to charge the bank with such notice, and to have imposed this duty, are simply the memoranda which accompanied the deposit, and the checks drawn.

The most that can be claimed for the memoranda is, that the number accompanying the deposit informed the bank that the sum deposited was derived from the case bearing that number, and the memoranda on the check informed the bank that the payment represented by the check was made to a party entitled to a dividend in a particular case noted on such check. Was this a sufficient reason to require the bank to disregard the orders of the clerk, and did it render itself liable for failing to disregard them?

We contend that the bank had a right to assume, as it did assume, that the memoranda were for the convenience of the court and its officers, and imposed no additional burden upon the depository.

In the first place, such assumption was in accordance with the direction of the court through the clerk. The bank had a right to presume that the court and its officers were properly performing their duty in the distribution of the trust fund. The Supreme Court of the United States, in a late case, (*National Bank* v. *Insurance Co.*, 104 U. S. 54,) says:

"A bank account, it is true, even when it is a trust fund, and designated as such by being kept in the name of the depositor as *trustee*, differs from other trust funds which are permanently invested for the sake of being held as such; for a bank account is made to be checked against, and represents a series of current transactions. The contract between the bank and the depositor is, that the former will pay according to the checks of the latter, and when drawn in proper form, the bank is bound to presume that the trustee is in the course of lawfully performing his duty, and to honor them accordingly."

The court will see that the foregoing is precisely in point on the question at issue here. The deposits were made to the credit of the court. There can be no dispute but that the account was rightfully kept in the name of the court, for the law expressly required it to be so kept. It could, in fact, be kept in no other way. The money was deposited by authority of the court, and the same authority only could withdraw it. The deposit could not be to the credit of any *case*, because the case itself could not make the deposit, or draw it out. The court, in its own name, deposited the funds, and by the same description withdrew them. There was nothing in the withdrawal to indicate that the trustee was appropriating the money to its private ends, or was such in fact the case. All the money was withdrawn by the trustee, *as such*, in what purported to be the fulfillment of the trust, and

here the principle cited from the decision of the Supreme Court has its application. As is there said, so long as the account is drawn against by the trustee, *as such*, "the bank is bound to presume that the trustee is in the course of lawfully performing his duty." The bank has no right to control the trustee in the execution of the trust. The trustee is responsible for that, and is clothed with authority to act. The bank, however, would have no right to treat the fund as the private property of the trustee, and the beneficiaries of the fund would have the right to follow the money into the hands of the bank to prevent its misappropriation. To this extent only do the authorities go.

The case just referred to in the 104th U. S. 54, illustrates very clearly the distinction between the case at bar and that class of cases within the principle of which, it is contended, this case is included.

In the case cited, one A. H. Dillon, jr., was engaged in business, in Baltimore, as the general agent of the Connecticut Life Insurance Company. It was his duty to collect and receive premiums, on policies issued by the company, from persons residing within his territory, and remit the same to the company, at Hartford. This he usually did twice a month, finally accounting for the business of each month at its close. The mode of remitting was by checks upon a Baltimore bank, to the order of the secretary of the company. To this end, he opened an account with the bank, designated on its books, as follows: "*Dr.*—CENTRAL NATIONAL BANK, in account with A. H. Dillon, Jr., General Agent,—*Cr.*" To the credit of this account he deposited from time to time, premiums collected for the insurance company, and remitted twice a month his checks, signed by him *as general agent*, and payable to the order of Jacob L. Greene, secretary of the

appellee. In the course of his dealings with the bank, he borrowed on his private account $10,000, for which he gave his personal note. The note not being paid, the bank charged this amount against his account as "gen'l ag't." The insurance company brought suit against the bank, and recovered the balance to the credit of Dillon, "gen'l ag't," including the amount charged to the note. The court held that the bank could not treat the trust fund, deposited with it as such, as the private property of Dillon, and offset their claim against him. After using the language already quoted, the court adds:

"But when against a bank account designated as one kept by the depositor in a fiduciary character, the bank seeks to assert its lien as a banker for personal obligation of the depositor, known to have been contracted for his private benefit, the bank must be held as having notice that the fund represented by the account is not the individual property of the depositor, if it is shown to consist, in whole or in part, of funds held by him in a trust relation."

But it is in this same connection that the court say, that if the funds had been drawn against in proper form by the trustee, the bank would be bound to presume that he was in the proper performance of his duty. If, for instance, Dillon had drawn against the account, as "gen'l agent," in favor of other parties than his principal, it would then have presented a case parallel with the one at bar. The bank knew that he was agent for the Life Insurance Company, and that the fund on deposit belonged to that company. They knew, from the course of dealing, that money withdrawn on that account was invariably in favor of the insurance company. And yet, if a check had been presented signed "A. H. Dillon, gen'l ag't," in favor of a stranger to the fund, the bank would have been bound to honor it, because they would be bound to presume that the trustee was in proper performance of his trust. It concerned them only to know that the depositor purported to be

acting as trustee, and it was not their right or duty to interfere. So the Supreme Court decide in that case, and we confidently assert that no well considered case can be found which holds a contrary doctrine.

A number of cases are reviewed by the court, all of which maintain the same distinction. In *Duncan* v. *Jourdan*, 15 Wall. 165, Jourdan held certain stock as trustee, which he pledged with a bank to secure a loan for his own private benefit. The certificates of stock pledged showed on their face that they were held by him *as trustee for Mrs. M. T. B. Jourdan*, and the bank knew that the loan made on these collaterals was for his own private use. The court, of course, held that the bank was chargeable as a party to the breach of trust. The bank had no right to treat the trust fund as the private property of the trustee. *Shaw* v. *Spencer*, 100 Mass. 382, was a similar case, and decided the same way.

In the case of *Pennell* v. *Hurley*, 2 Col., C. C. 24, the depositor having two accounts, one in trust, the other in his own name, drew his check as trustee to pay his private debt to the banker, the court say:

"Money is due from A to B in trust for C. B is indebted to A on his own account. A, with knowledge of the trust, concurs with B in setting one debt against the other, which is done without C's consent. Can it be a question in equity whether such a transaction stand?"

In *Bodenham* v. *Hoskyns*, 2 De G. M. & G. 903, the principle was stated to be one acted upon daily by courts of equity, "according to which a person who knows another to have in his hands, or under his control, moneys belonging to a third person, cannot deal with those moneys for his own private

benefit, when the effect of that transaction is the commission of a fraud upon the owner."

In the case of *ex parte Kingston, in re Gross*, (Law Rep., 6 ch. App. 632), a county treasurer had two bank accounts, one headed "Police Account." Some of the items to his credit in this account could be traced as having come from county funds, but most of them could not. The checks which he drew upon it were all headed "Police Account," and appeared to have been drawn only for county purposes. For the purposes of interest, the bank treated the accounts as one account, and the interest on the balance in his favor was carried to the credit of his private account. The manager of the bank knew he was county treasurer, and understood that he had been in the habit of paying county moneys into the bank. He absconded, his private account being overdrawn, and the police account being in credit. It was held that the bank was not entitled to set off the one account against the other, but that the county magistrate could recover the balance standing to the credit of the police account. Sir W. L. James, L. J., said: "In my mind, this case is infinitely stronger than those referred to during the argument in which a similar claim on the part of bankers was disallowed; for in those cases the bankers relied on cheques received from the customers; *and if a banker receives cheques from a customer holding a trust account, he is not in general bound to inquire whether the cheque was properly drawn or not.* Here the customer has drawn no cheque, and the bankers are seeking to set off the balance on his private account against the balance in his favor, on what they know to be a trust account."

There is another class of cases cited by the Supreme Court, in the case of *Bank* v. *Insurance Co.*, which hold that when trust

funds have been deposited in bank, the beneficiary may follow such funds, even when they have become mixed with the other money of the depositor. None of this class of cases bear any analogy to the one at bar.

A late decision of the Supreme Court of Illinois—*Fifth Nat. Bank* v. *Hyde Park*, 101 Ill. 595—is very much in point, and is in full accord with the cases already cited. One Waldron, treasurer of the village of Hyde Park, kept an account with the bank as "Treasurer." He gave the bank a check on this account to pay a note of $50,000 for money he had previously borrowed in his own name, but which, at the time, he had represented to be for the use of the village. The court, after an extensive review of the authorities, concludes that the bank cannot be held liable unless it was a party to the breach of trust, and with knowledge of the fraud.

At page 606, the court say:

"It follows that, under the circumstances, at the time when the officers of this bank received payment of this loan, they were not aware that, as between the village of Hyde Park and Waldron, he had not lawfully and equitably the right to apply the public funds to this debt. They must be assumed to have known the law in relation to the transaction, but the law does not impute to them omniscience as to the facts. Taking the facts as these officers believed they were, and as they had good cause to believe, the payment would not have been a misappropriation of the funds."

Although the form of transaction indicated that the money of the village was received by the bank in payment of the private debt of the treasurer, yet it is held that the bank was justified in relying upon the representations of the officer as to the purpose of the loan.

The present case is infinitely stronger than the one cited. Here the bank was not even a party to the breach of trust, receiving no direct or indirect benefit therefrom. Neither was there any appropriation of funds to the private purposes of the trustee, all the money being distributed to parties to whom the trustee was indebted on the trust account. Even if the appropriation, as made, was a wrongful diversion, yet "taking the facts as the officers of the bank had good cause to believe," — from the conduct of the clerk,—"the payment would not have been a misappropriation of the funds"

Without quoting further, we invite the especial attention of the court to this opinion and the authorities therein reviewed.

We repeat our assertion then, that the result of all the cases is simply to establish the proposition that when money is deposited with a bank in a trust capacity, the bank cannot deal with it as the private property of the depositor. In 2 Daniel on Negotiable Instruments, sec. 1612 *a*, the principle is stated thus:

> "If a deposit be made in a bank to the credit of a certain person as agent or trustee, the use of such terms would charge the bank with notice that the funds were there in a fiduciary relation; it would have no lien upon them for the private debts of the depositor, and if it permitted them to be used for his private purposes in transactions with the bank, it would be bound."

The principle is everywhere limited to the dealings by the depository with the trustee. In such case, the bank becomes a party to the breach of trust. The principle has never been extended, so far as we are aware, to breaches of trust by the trustee, to which the depository was not a party. It has never been extended to cases where the trustee, while purporting to be carrying out the trust, has misappropriated the funds by dealings with third parties. When the trustee, as such, directs the depository

to pay the funds to a stranger, the depository is bound to honor the demand. It is not a party to the breach of trust, if any is committed, and it has no right to interfere with or control the action of the trustee. The beneficiary may, it is true, by interfering in time, stop the funds in the hands of the bank, and recover them.

Not only has this proposition never been disputed by the courts, but on the contrary, it has been expressly recognized and affirmed in the cases cited above. As is there said, when the depository is dealing with third persons, "the bank is bound to presume that the trustee is in the proper performance of his trust." 104 U. S. 54.

The duties of a bank as to paying checks on a fund deposited by a trustee, is stated by Morse on Banking, at page 274, as follows:

> "The bank will always be justified in making payments upon orders of the person who brought the desposit, or upon orders of any person whom he designates to control it, until it has notice that the ownership is claimed by somebody else, adversely to either of the parties. Mere notice that the ownership is elsewhere, is of no effect."

The manner in which the account was kept did not even afford notice to the bank that the money was being misapplied by the trustee; it in fact procluded any such notice. The memoranda accompanying the deposit and withdrawal of the funds merely informed the bank in the first place that the particular sum deposited was derived from a certain number or case, and in the second place that the payment represented by the check was to a party having a claim in a particular case. The bank could have no knowledge of the fact that the court or its officer was improperly witholding funds from deposit, because the account

was, by direction of the court, kept as a unit, and not as a seperate account with each case. So long as the account was thus kept as a unit, so long as the entire deposits were kept to the credit of the court, as a general fund to be drawn against by the court, it was practically impossible for the bank to know, by information furnished by the memoranda, that there was a deficiency in funds deposited in any particular case.

There were over two thousand cases on the bankruptcy docket of the court; there were also over two thousand cases on the civil, and criminal and admiralty docket of the court, so that at the time the deposits in question were made, there were two cases numbered 2105 in the district court. The court had several other depositories besides the plaintiff in error. There was nothing to prevent the court from depositing funds derived from a particular case in one depository, and drawing against the fund in another depository, to meet dividends in that case. So that even if the bank had been aware of the fact that the court was drawing to pay dividends in cases in which no deposits had been made with them, it might have supposed the money in that case was deposited elsewhere, or was still in possession of the court. No loss would have occurred to any one by this practice, if the officer of the court had preformed his duty in regard to depositing funds.

We do not regard the question of notice material. On the principle of the authorities cited, we have attempted to show that the bank would not be liable even with notice, in the absence of an adverse claim made by the beneficiary while the fund was still in the possession of the bank. But we say that in this case the facts appearing did not even afford notice to the bank of any irregularity.

The question may be simplified by supposing that deposits were made with plaintiff in error in but *one* case only. The funds in that case are credited to the District Court, and a memorandum made as to the number of the case to which they belong. A check is presented at the bank drawn by the court and in proper form, directing the bank to pay A. B. a certain sum. The order is not drawn against funds to the credit of the case, but to the credit of the court, for in that name the money was deposited. What is the bank to do with this check? Its contract with the depositor and the law require it to pay the funds in its hands according to the orders of the depositor. The bank can see that the payment the court has ordered to be made is in a different case from the one the court derived the fund deposited. But the order contained in the check is peremptory. It is: "State National Bank, pay to the order of A. B., one hundred dollars." *Not out of any special fund, but without qualification.* Of course if there is money deposited in one case only, the check must be paid out of that, if at all. Can there be any question as to the duty of the bank under such circumstances? It would necessarily be to pay the check. The bank would be bound to presume that the court was in the proper performance of its duty, and it would have no right to infer that the court or its officers were diverting the funds because the money deposited was derived from one estate, and the payments were made on account of another. It would have no right to interfere, even if it could make such inference. The bank is no party to the transaction between the court and the payee of the check. It is its duty to keep safely the money of the court until the court shall call for it, and then pay it to whomsoever the court shall direct. The use of a depository has no other

purpose than the safe keeping of the funds, and the depository can make no other inquiry on paying out the deposit, than relates to the question whether the order for the funds is drawn by the same party to whose credit they were placed.

If the bank in such case had presumed to pass upon the right of the court to thus distribute the fund, it could not know but that the court had advisedly ordered that a party having a claim against one estate should be paid from funds derived from another estate. It could not know but that the fund in the other case had been deposited in another place, or was otherwise in the possession of the court, or otherwise disposed of. It would be the hight of folly for the mere depository of the court to attempt to interfere with the administration or orders of its principal.

Thus we see that in the strongest case that could be put, that of a single deposit derived from a single case, there is no authority, in reason or precedent, for holding the bank accountable for the distribution of the fund when made by the trustee in its official capacity, to parties other than the bank. But in the present case, the notice that might be inferred from a single deposit is wholly beyond question, with hundreds or thousands of deposits belonging to as many different cases, all deposited as a common fund, to the credit of the court, and treated, by direction of the court, as a fund to be drawn against generally.

It may be contended that the effect of the number accompanying the deposit is to make the account as if it read:

"The State National Bank of Springfield, Illinois, in account with the United States District Court for the Southern District of Illinois, *on account of case 2105, in the bankrupt court.*"

This claim cannot be sustained, and if it could be, it would not affect the force of what has heretofore been said. In the first place, it is not true, in fact, that the account was thus opened; it was opened with the District Court simply, as the heading of the book shows. There was no direction to enter the deposit as on account of the case; on the contrary, the deposits were kept as one fund, by direction of the clerk, which of itself negatives the conclusion that the deposit was special.

The account being opened "in the name and to the credit of the court," the bank would have no right to credit the amount specially to any number, unless directed to do so either by the clerk or the law. Neither were the checks drawn against any special deposit, as an examination will show. The order is to pay a certain sum of money, not out of any special fund. There is no direction to charge the amount to any special fund, but the order to pay, which stands out separate and distinct from the rest of the check, is without qualification or limitation. If it were true that the deposits were special, there must have been as many separate accounts as there were cases, and as many books as there were accounts. At least, each account must have been kept by itself in a separate page or book, and the order to pay would have been to charge to the account *against* which the check was drawn. Yet but *one* account was opened, the deposits being made indiscriminately and entered as belonging to one account, viz: to the account of the court. And the law, we shall see, required the credit to be so given and the account so kept.

There was no necessity or reason for requiring the bank to assume any duty whatever as to the distribution of the fund, beyond what it actually performed. The law entrusts the administration of all matters in bankruptcy to the District Court of the

United States, and provides an ample corps of officers and functionaries for that purpose. The duties of such officers are strictly defined.

Rule No. 5 requires registers in bankruptcy to conduct certain proceedings in bankruptcy, such as the auditing and paying of costs, expenses and dividends, thus embracing all possible disbursements.

Rule No. 28 requires the register to keep separate accounts with each estate. The same rule requires the clerk or assignee to keep a book, in which shall be entered all checks or drafts, with the order of time in which they are drawn, and that such checks or drafts shall be numbered in the case of each estate. The assignee is required to pay into court the amount received by him from any estate, and rule 28 requires the clerk to deposit such money in one depository—that is, the money received in any one case shall be deposited in one depository, but the rule recognizes the right of the court to have several depositories. The clerk is required to make a report to the court of the funds received by him, and of deposits made by him, on the first Monday of every month. The assignee is likewise required to file a report with the register, and all checks are drawn under the direct supervision of the court or the register, one or the other being required to countersign each of them.

Here, then, is a complete system of checks, which, if enforced by the court, renders the misappropriation or diversion of funds impossible. The books required to be kept, and the reports required to be made, show, at all times, the condition of any estate, the amount deposited, the amount withdrawn, and on what account.

Under such circumstances, the bank might well presume that the court was engaged in the proper administration of the trust, and hence give itself no concern as to whether the distribution was being made to the proper parties, especially when its manner of keeping the account was not only in accordance with the directions of the officer of the court, but, upon repeated settlements, was ratified and approved—approved not only by the clerk, but supposably by the court, to whom the clerk was, by law, required to make monthly reports.

We think the foregoing fully establishes the proposition that the duty to keep the account of each estate separate, and to refuse the payment of the checks drawn to make payment in cases in which the clerk had failed to make a deposit, did not arise from the manner in which the account was kept, or the memoranda connected therewith. It cannot rightfully be claimed that the memorada had the effect of charging the bank with the loss; but the real purpose of the memoranda is so evident, that it is a matter of surprise to us that it should ever have been questioned.

It was of no importance to the bank that the checks should show the account for which they were drawn, but it was of the utmost importance to the court and its officers. The checks, when returned to the court, were not only receipts for the sums represented by them from the parties in whose favor they were drawn, but they were vouchers in the case, showing the manner of distribution. The memoranda on the checks were obviously for the convenience of the depositor. So, also, with the number accompanying the deposit. The clerk was required to show to the court that he had deposited the funds received by him. It was, therefore, necessary that each deposit should be distinguished by some mark which the court and the clerk could identify, as showing that he had performed his duty.

The memoranda undoubtedly were for a purpose of some sort. To hold that purpose was for the convenience of the depositor, accords with reason and common sense, as well as with the acts of the parties. To hold that it was to control the bank in the payment of the checks, is contrary to all principle and precedent. When a thing has a perfectly natural and sensible purpose, why give it an unnatural, strained construction?

As is well known to everyone who has any experience in keeping a bank account, it is a very common practice for a depositor to make a memoranda of the nature of the deposit, or of the account for which the check is drawn. Such memoranda, in practice, are always regarded as being for the convenience of the depositor. The bank pays attention to nothing but the signature and the order to pay; but the bank account, at the same time, affords the depositor with the means of knowing the condition of his affairs, or with vouchers from parties to whom he has made payment.

Take the case of one who is administrator of several estates. He opens an account with a bank as "administrator." He deposits a number of drafts payable to his order as administrator of the several estates, respectively. The bank thus has notice that the fund is a trust fund, and also the sources from which it is derived. If the bank should deal with this fund as the private property of the administrator, it would, according to all authorities, be bound. But if the administrator draws checks, in his official capacity, in favor of third parties, distributees of one or more of the funds, there is no principle and no authority which would hold the bank responsible for the proper distribution. The bank might, for the convenience of the depositor, note on his pass book the name or number of the case to which

each deposit belonged; and the checks drawn might indicate the case in which the payment was made, but such fact would not impose the duty on the bank to balance the checks and deposits in each case. As long as there were funds on hand to the credit of the "administrator," the bank would be bound to honor the checks.

Such, we venture to say, is the practice and understanding of bankers and business men everywhere, and such is the conclusion of the courts, so far as they have passed upon the subject, as we have already seen.

The rules which govern an account kept by a court, do not differ from those in other cases.

Otis v. *Gross*, 96 Ill. 613.

II.

The duty to keep a separate account did not arise from any law of the United States.

Sections 5059 and 5504, Revised Statutes of the U. S., provide as follows:

"Section 5059. The assignee shall, as soon as may be after receiving any money belonging to the estate, deposit the same in some bank in his name as assignee, or otherwise keep it distinct from all other money in his possession; and shall, as far as practicable, keep all goods and effects, belonging to the estate, separate from all other goods in his possession or designated by appropriate marks, so that they may be easily and clearly distinguished, and may not be liable to be taken as his property or for the payment of his debts."

"Section 5504. Every clerk or other officer of a court of the United States, who fails forthwith to deposit any money belonging in the registry of the court or hereafter paid into court or received by the officers thereof, with the Treasurer, [*and*] assistant treasurer or [*of*] a designated depository of the United States, in the name and to the credit of such court, or who retains or converts to his own use or to the use of another any such money, is guilty of embezzlement," etc.

Here, then, instead of a requirement that money shall be deposited to the credit of, or on account of, the cause from which it is derived, is a positive enactment that it shall be deposited "in the name and to the credit of the court." This necessarily means a general deposit to the credit of the court. It is intended that the money, when deposited, shall be under the control of the court, and, of course, to be withdrawn only upon the order of the court. But there is no intimation that the deposit shall be special, or the authority of the court, on its withdrawal, be limited, in each case, to the particular fund originating in such case. There could be no necessity for this, if the clerk performs his duty; and the act seeks to enforce that duty by requiring a bond from the clerk, and providing criminal punishment for its violation.

What object could there be in a law or regulation of the character suggested? The parties entitled to the funds in court are all alike beneficiaries of the court. The only effect of such a provision would be to transfer a loss from one set of beneficiaries to another,—there could be no good purpose in that, as the beneficiaries all have equal equities against their trustee, the court, and the latter could have no object in discriminating between them. The law of course contemplates that all shall be paid alike; and, to that end, provides safeguards to secure the performance, by its officers, of their duties, and requires them to give security for such performance; and when money is deposited to the credit of the court, it contemplates that the court will attend to the distribution thereof. There is certainly no intimation in the Revised Statutes that the *depository* shall have any control over the court in the distribution, or perform any duty beyond keeping the funds safely until called for by the court.

The only provision in the Revised Statutes in regard to the keeping of separate accounts by depositories, is section 3642, as follows:

"Every depository shall keep his account of the money paid to or deposited with him, *belonging to the post-office department*, separate and distinct from the account kept by him of the public moneys so paid or deposited."

The next section, 3643, is as follows:

"All persons charged by law with the safe keeping, transfer and disbursement of the public moneys, other than those connected with the post-office department, are required to keep an accurate entry of each sum received, and of each payment or transfer."

Congress is here legislating directly upon the manner of keeping the accounts by depositories, and requires separate accounts only as to one class of moneys; as to all others, the requirement simply is that a record shall be kept of each sum deposited and of each payment made. According to the most familiar rules of construction, this is equivalent to a positive enactment, that in all cases other than post-office money, the depository is not required to keep separate accounts, but that his duty is discharged by keeping an account only of the deposits and withdrawals—all of which was done by the depository in this case.

The only other provisions of law relating to this subject, are sections 995 and 996. They are as follows:

"Section 995. All moneys paid into any court of the United States, or received by the officers thereof, in any cause pending or adjudicated in such court, shall be forthwith deposited with the Treasurer, and assistant treasurer, or a designated depository of the United States, in the name and to the credit of such court."

"Section 996. No money deposited as aforesaid shall be withdrawn except by order of the judge or judges of said courts, respectively, in term or in vacation, to be signed by such judge

or judges, and to be entered and certified of record by the clerk; and every such order shall state the cause in, or on account of, which it is drawn."

Still there is no intimation that the depository shall keep a separate account of the sums deposited—in fact, the contrary rule is fairly deducible from these provisions. The law requires the order to state the cause on account of which the sum is drawn. The purpose of this provision is obvious—that the judge, when he signs the check, may know for what purpose the money is drawn; the check serves as a voucher in the case, and shows what disposition has been made of the money. But the fact that Congress, while thus providing for the manner of *withdrawal* of the funds, is silent as to requiring separate accounts, indicates to us that the keeping of such separate accounts was not contemplated.

It was never contended that it was necessary, and it never was the practice, under these provisions of the statutes, which have been in force many years, to keep separate accounts. It is claimed, however, that Rule 28, in Bankruptcy, made this necessary,—to which rule attention will next be directed.

III.

The duty to keep separate accounts did not arise because of anything contained in rule 28, in bankruptcy.

Mr. Justice Harlan, who sat with Judge Treat in the Circuit Court of the United States for the Southern District of Illinois, when this case was considered in the court below, decided the bank to be liable solely on the effect of Rule 28.

The following is the substance of his opinion:

"I think the clear meaning of this rule is, the words 'severally on account of any bankrupt's estate,' mean that the officer, when he makes the deposit, must indicate, by the form of the deposit,

the account on which he makes it. He would not be complying with the rule to make the deposit generally to the credit of the District Court of the United States. He must indicate, in the form of the deposit, the account on which the deposit is made. If in a uankrupt's estate, he should say, or have it said, upon the books of the bank, or upon the book which he keeps, that it is on account of the bankrupt's estate—A, B, C, D or E. That construction is borne out by the fact that when a check is drawn, it is required by the rule to state the date, sum, and account for which it is drawn. Now, I think that the deposit book is to be regarded and to be understood as if there was an account kept with each one of these cases in which a deposit is made, as if it read 'The State National Bonk of Springfield, Illinois, in account with the United States District Court for the Southern District of Illinois, on account of case 2197, in Bankrupt Court."

We have no desire to undervalue the weight that should be attached to an opinion of Justice Harlan; but we submit that, at this stage of the proceedings, his opinion is entitled to consideration only so far as it is supported by reason or authority. As for authority, none whatever is cited. That leaves us to consider what is the true construction of rule 28. The rule is as follows:

RULE 28 IN BANKRUPTCY.

"The District Court in each district shall designate certain National Banks, if there are any within the judicial district, or if there are none, then some other safe depository, in which all moneys received by assignees or paid into court in the course of any proceedings in bankruptcy shall be deposited; and every assignee, and the clerk of said court, shall deposit all sums received by them severally, on account of any bankrupt's estate, in one designated depository, and every clerk shall make a report to the court of the funds received by him, and of deposits made by him, on the first Monday of every month. On the first day of each month, the assignee shall file a report with the register, stating whether any collections, deposits or payments have been made by him during the preceding month, and, if any, he shall state the gross amount of each. The register shall enter such reports upon a book to be kept by him for that purpose, in which a separate account shall be kept with each estate; and he shall also enter therein the amount, the date, and the expressed purpose of each check countersigned by him. No moneys so deposited shall be drawn from such depository unless upon a check or warrant, signed by the clerk of the court, or by an assignee, and countersigned by the judge of the court, or one of the registers designated

for that purpose, stating the date, the sum, and the account for which it is drawn; and an entry of the substance of such check or warrant, with the date thereof, the sum drawn for, and the account for which it is drawn, shall be forthwith made in a book kept for that purpose by the assignee or the clerk; and all checks and drafts shall be entered in the order of time in which they are drawn, and shall be numbered in the case of each estate. A copy of this rule shall be furnished to the depository so designated, and also the name of any register authorized to countersign said checks."

The conclusion of Justice Harlan is based wholly on the word "severally," as employed in the rule, in the following clause:

"And every assignee, and the clerk of said court, shall deposit all sums received by them severally, on account of any bankrupt's estate, in one designated depository, and every clerk shall make a report," etc.

Now, notwithstanding the conclusion of Justice Harlan, we submit, with all due deference, that the word "severally" refers to the assignee and the clerk, and not to the manner in which the deposit shall be made. The clause is to be construed as if it read thus:

"Every assignee and the clerk of said court, *severally*, shall deposit all sums received by them on account of any bankrupt estate, in one designated depository."

The clause following: "And every clerk shall make report to the court of the funds deposited by him, on the first Monday in each month," is confirmatory of this construction.

The rule, as will be seen, prescribes the duties of the court and its officers regarding the deposit of moneys. It is absolutely silent as to the duty of the depository. It directs the manner of withdrawing the funds deposited, and directs that a copy of the rule shall be furnished the depository. The object of the last provision is, that the bank may know that checks presented are properly signed and drawn.

The rule does not, in any manner, change the law, as it is left by the provisions of the Revised Statutes already quoted. It does not attempt to prescribe the duties of the depository, because they are already defined by law. The rule does not require the deposit to be made and kept separately in each case. It does not require any reference to be made to any case, number, or to the title of any bankrupt estate, in making deposits. Such entries were only made here by the voluntary direction of the clerk, and were, at the same time, accompanied with the instructions to keep the account as a unit.

Rule 28 does require that each check shall be countersigned by the judge or register, and shall show the date, amount, and the account *for* which it was drawn. It also requires that like entries as to all checks drawn should be kept by the clerk or assignee. The checks themselves would operate as receipts, and, taken in connection with the books kept by the officers of the court, would show the condition of each estate at any time.

The rule of the court intended that each check should be a voucher, and show the *purpose* for which it was drawn; but the very form of the checks, as well as the phraseology of rule 28, sufficiently shows that the bank was not expected to keep separate accounts with each estate. Had that been the intention each check would have directed the bank to pay the money named therein, *and charge the same to the particular account*. This would have been the course pursued had the court opened a number of separate accounts with the bank, and the rule would have required each check to state the account *against* which, or *upon* which, it was drawn; but the

order only requires each check to state the account for which it was drawn,—in other words, to state the *purpose* for which it was used.

We respectfully submit, that a rule requiring checks to state the *purpose* for which money is to be used, is not to be construed as a direction to the bank to keep the funds of a single depositor under as many separate heads, and in as many seperate accounts, as such depositor may have separate purposes therefor. An order to keep separate accounts should precede or accompany deposits, and is not to be inferred from memoranda appearing on checks, and intended to constitute a record of the use to which the funds are applied.

Independent of rule 28, the general provisions of the law, adopted long before the bankrupt act was passed, required, as we have seen, money deposited to the credit of the court, to be drawn by check signed by the judge, "stating the cause in, or on account of, which it was drawn," and yet it is conceded that this provision did not require the deposits to be made to the credit of each separate account, or the accounts to be kept separately, so far as the depositor was concerned.

This provision of the general statute in regard to the form of the check is carried into Rule 28 in Bankruptcy, but as we have seen, there was no direction whatever as to any number or name of case being required to be given to the depository.

Now, when it is borne in mind that under the general statutes the stating or numbering of the cause in which the check was drawn did not import to the depository that there was any separate fund or account *against* which the check was drawn, how is it to be argued that the mere repetition of this provision in rule 28

was notice to the depository that thereby a radical change was intended as to the form of keeping the account.

If it was intended that the depository should have notice from this rule that it was to keep a separate account with each estate, and to honor no check except from funds deposited in the particular estate, is it not clear that the ruls itself should have so specified?

To return again to the word "severally," we submit that any construction of the language used to the effect that it indicated or purported anything further than that the clerk and assignee, respectively and severally, were to deposit all sums received by them on account of any bankrupt estate, is tortured, unnatural and inadmissible. The term "severally" has reference and application only to the respective duties of each of the officers—in other words, that the duty assigned is not a *joint* but *several* duty on each.

The words "on account of any bankrupt estate," are to be taken in connection with the words preceding, "received by them," and as relating to the character of the moneys received by them, and having no reference whatever as to a mode or form of the deposit to be made of such fund.

Congress has passed laws upon this subject of the keeping of accounts by depositories, and the Bankrupt Court has made rules concerning the same thing. In none of these provisions at least is it required *in terms* that the account of moneys belonging to the several estates shall be kept separate. It is only provided that the deposit shall be in the name and to the credit of the court. Why should a matter of such importance, if it was required as claimed, be left to inference? Why do none

of these provisions, which purport to embrace the whole subject, say, *in terms*, that accounts shall be so kept? The depository is an officer of the court, charged with important duties and trusts. It is not usual to leave the duties of such officers to doubt or inference. If it was intended to make the depository an instrument for controlling the court in the distribution of the fund, to keep the accounts separate of the moneys in each of the thousands of cases in which deposits were made, and require it to refuse the payment of drafts drawn in proper form against the fund to the credit of the court, when, upon examination, it found no money to the credit of the case in which the draft was drawn, why was the law left in such a state as to cause the bank, while honestly attempting to perform its duty according to the most obvious construction of the laws, according to the best judgment of experienced business men, and in direct pursuance of the directions of the officer of the court, *to become the scapegoat for the defalcation of the officer.*

We say, with confidence, that the law never intended such a result. That the law does clearly define the duties of the depository, which are to keep the money safely, and to keep an accurate record of the sums deposited and withdrawn, and to keep a separate account of postoffice money. Beyond these no duties are prescribed, and they are sufficient to answer every purpose for which a depository is created. If the law had required more it would have said so, and so plainly that no mistake could have occurred, that the depository might have known in the beginning what its duties were. The fact that the law has made no such provision, is conclusive evidence, in our minds, that no such requirement was contemplated. In fact, the provisions on the subject amount in effect to positive enactment to the contrary.

We have now examined every source from which the alleged duty on the part of the bank could arise. We have found that the account was kept in strict accordance with the directions of the officer making the deposit, and that on repeated settlements of the account with the court, the course pursued was ratified and approved. We have found that the natural and obvious use of the memoranda was for the convenience of the court and its officers, and that from such memoranda the bank could have had no notice of the defalcation of the clerk, or the diversion of the funds. The account being kept as a unit precluded such notice. That even if the bank could have ascertained the fact from the memoranda, it was still bound to honor the checks of the court,—that it was bound to presume that the court was in the proper performance of its duties. So long as the bank did not participate in a diversion of the trust money to the private purposes of the trustee, it could not be liable upon the principle of any decided case. We have found that the memoranda were accompanied with directions to keep the account as a unit, and the duty to keep a separate account could therefore not have arisen from the manner in which the account was directed to be kept, or from the memoranda.

We have found that the statutes and rules of court, so far from specifically requiring the keeping of separate accounts, by direct implication provide to the contrary.

Let the responsibility for the loss fall where it belongs—not upon the parties who have faithfully performed their duty according to the plain construction of the law, and according to the course of long established usage among business men, but upon one whose criminal misfeasance caused the loss. There

should be no contention among the beneficiaries of the court as to *which* of them should be paid from the money left with the court for them. Because the money taken from the treasury of the court happened to be derived from some particular source, is no reason why the court should compel the parties for whom that money was intended to bear the whole loss. The law required the clerk to give security for his conduct. Let his sureties make good the loss, so that all can be paid alike. If they are sued, no question can arise as to the breach of duty. It will not be necessary to resort to inference or tortured constructions of the law to fix their liability.

The law did not require the keeping of separate accounts, because it was never contemplated that a part of the beneficiaries of the court should be paid and others lose their money. Safeguards were provided to secure the deposit of the money in the first instance to the credit of the court,—bonds required, penalties provided, and monthly reports to the court enjoined. Safeguards were provided to prevent the withdrawal of the funds for any but trust purposes, by requiring each draft to state the account for which it was drawn, and to be signed by the court. These provisions were sufficient, if enforced, to secure to every beneficiary of the court his due, and we repeat, it was never in the contemplation of the law that a contest should arise among the beneficiaries of the court as to *which* of them should be paid.

MILTON HAY,
HENRY S. GREENE,
Counsel for Plaintiff in Error.

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, A D. 1886.

No. 263.

THE STATE NATIONAL BANK, OF SPRINGFIELD, ILLINOIS,
Plaintiff in Error,

vs.

THE ST. LOUIS RAIL FASTENING COMPANY,
Defendant in Error.

Error to the Circuit Court of the United States for the Southern District of Illinois.

BRIEF OF DEFENDANTS IN ERROR.

C. C. BROWN,
GEORGE HUNT,
Attorneys for Defendant in Error.

SPRINGFIELD, ILL.:
H. W. ROKKER, PRINTER AND BINDER.
1887.

SUPREME COURT

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The Circuit Court, on the trial below, rendered judgment for defendants in error, and certified the facts as in the record set forth.

From this judgment the State National Bank, of Springfield, Illinois, prosecutes a writ of error.

Plaintiff in error was appointed depository for the United States District Court for the Southern District of Illinois, about March

1st, 1873, and the fourth of March, 1873, by the direction of George T. Bowen, who was the Clerk of said court, opened an account with the U. S. District Court for the Southern District of Illinois, and entered said deposit to the credit of said court. Each deposit so made by the Clerk, was by the bank entered on its books, and on the deposit book of the Clerk, to the credit of the particular case, naming the case, with the number, to which the fund so deposited belonged. And whenever a check was drawn in payment of a dividend made in any case, such check likewise bore the name and number of the case. Afterwards, by the direction of the clerk, all deposits so made were entered by the bank in the name of the United States District Court for the Southern District of Illinois, dropping the name but retaining the number of the case.

The Clerk, Bowen, continued to make deposits of funds belonging in the registry of said court with the bank up to the time of his death, which occurred in February, 1880. Upon the death of Bowen, his successor continued making deposits, and the bank continued the same entries in its books and the Clerk's pass book, as had been the custom before Bowen's death.

When the bank received the deposits and made the entries, it understood that the entries on either side of the account referred to the case in which the deposit in the first place was made, and in which the check in the second place was drawn. The case in bankruptcy, that of H. Sanford & Co., was pending in the United States District Court for the Southern District of Illinois, during the years 1879, 1880 and 1881, and money realized from this estate during those years amounting to $38,300, which went into the registry of the court, and by the Clerk, Bowen, and his successor, Converse, within that period deposited with plaintiff in

error, each deposit of the items of this fund being accompanied by a ticket from the clerk like the following, differing only as to date and amount:

"STATE NATIONAL BANK,

SPRINGFIELD, ILLINOIS, July 25th, 1879.

Deposited by George P. Bowen, Clerk,

Current funds, number 2105..... $17,000"

The fund actually belonging to this case (2105), and deposited with plaintiff in error, in the manner already referred to, were sufficient to pay all checks drawn by the Clerk and countersigned by the Judge, in favor of creditors in said case, including the check in controversy.

All checks drawn thereon, including the check in controversy in the suit, only amounting to $33,356.19, leaving a balance to the credit of said case number 2105 of $4,943.81.

The Bank, instead of requiring the funds belonging to this case 2105 to be checked out by checks bearing this number, suffered it to be drawn out by checks with different numbers, many of such checks being drawn as indicated therein in cases in which no deposit had been made by the Clerk, and the entire amount deposited in the case 2105 had by this means been drawn out of the bank before the drawing and presentation of the checks in controversy. Indeed, the substance of the contention of plaintiff in error, as a defense to the suit on these checks drawn on the fund deposited to the credit of case 2105 is, that it had already paid dividend checks in other cases in which no deposits were made, and therefore had the right to appropriate the funds belonging to this number to cover the deficit caused by paying checks drawn in cases in which no fund had been deposited.

The position is unsound as a legal proposition, and cannot be maintained. Each bankrupt's estate, in our opinion, constitutes a separate case. Whenever a deposit was made by the Clerk, specifying the name of the bankrupt or the number of his case, which would be just as convenient, the amount and date of such deposit, it then became the duty of the bank to open an account with each bankrupt estate, and to so keep its books that every subsequent entry in such case, whether made as a credit by deposit of the Clerk, or as a debit by checks drawn by the Clerk in favor of the creditors of such bankrupt, should fully appear, and thereby, at all times, have the means of determining the amount deposited to the credit of each case, as well as the amount paid out.

Both the spirit and the language of Rule 28 of the orders in bankruptcy require this course. When such a deposit was made what follows? It seems quite clear to us that the bank became at once a trustee for the beneficiaries of the particular bankrupt estate, and liable to pay the dividend checks in each case, drawn by the Clerk and countersigned by the Judge. The action of the bank, based on the theory that it had the right to treat the whole as an account simply with the United State District Court, and that it was entitled to honor any check drawn by the Clerk and countersigned by the Judge, and if in so honoring such checks it became unable to meet some of the checks drawn upon the deposits, is a matter between the check-holders and the Court on the one side, and the Clerk on the other, with which it has no legal concern—has no sanction from the law.

The money deposited in 2105 equitably belonged to the creditors of H. Sanford & Co., and the Bank had notice of that by the

unusual manner in which deposits were made, and the account was left between the Clerk and the Bank.

The Bank knew the funds bore a trust character, and the number indicated the estate to the credit of which each deposit was made. It also knew, was bound to know, when a check was presented that an order of distribution had been made in the case numbered on the check. It was bound to know that no such order would have been made unless the money had come into the hands of the Clerk for distribution. If the Clerk had failed to deposit it, the Bank must have known that he had appropriated it to his own use, and the Bank, by honoring the check from funds deposited in other cases, aided and assisted him in that unlawful appropriation. Shall the Bank now, after its own negligence in this regard, be permitted to make itself whole by retaining the funds deposited in other cases?

It seems to us, upon principle, that the Bank had notice of the manner of receiving and keeping the account, and the form of check, that moneys deposited in case 2105 could only be paid to persons presenting checks containing that number, without reference to Rule 28. But when the object, force and effect of that rule are considered, there certainly cannot be any question about the Bank's liability in this case.

The rule provides that "no moneys so deposited shall be drawn from such depository unless upon a check or warrant signed by the clerk of the court or by an assignee, and countersigned by the judge of the court, or one of the registers designated for that purpose, stating the date, sum and account for which it is drawn." The check in this case was in compliance with the rule. It stated the date, the sum and account for which it was drawn. Now were these funds deposited to the credit of that account sufficient

to meet the check? It is conceded they were. Not only enough to pay the check, but to pay it after the payment of all checks previously presented, which had been drawn upon that account.

We take the liberty of quoting from an opinion of Justice Harlan in deciding this identical question, on the circuit, as reported by the stenographer at the time:

"That bank is made a depository of this court. Under the statute it is made the duty of the clerk and other officers of the court receiving money to deposit it in that bank. The former clerk of the court made his deposits in the form indicated by their books. It was a little differently done at the outset, but after a while it was charged to conform with this mode. This account is headed, 'The State National Bank of Springfield in account with the U. S. District Court for the Southern District of Illinois.' On March 10, 1880, for instance, there is an entry on the debtor side of the account, 'deposit number 2197, ten dollars'—2197 indicating the number of the case in which deposit was made. On the opposite side of the account, on the credit side, is the amount of the check, and opposite that the number. That number is taken from the check, and indicates the case in which the check is drawn.

"There is no dispute in the evidence in this case that the bank understood when the entries were made, that these numbers on either side of the account, referred to the case in which the deposits in the first place were made and in which the check in the second place was drawn. There is a difference between the records of this court and of that bank as to what that bank owes. The former clerk of the court has, according to the evidence, received money on account of particular cases and failed to make deposits in the bank on account of those cases. He nevertheless, from time to time, in pursuance of the orders of the court, drew a check upon the bank, each check indicating the number of the case, and the bank treating the account as an aggregate, and as an account only with the court, honored the checks. The result was, as we can see, on the face of the statement, that when the bank paid checks drawn upon account of a particular case, without deposit having previously been made on account of the case, it necessarily took from the general fund, in the bank, money which had been deposited on account of other cases."

Referring to the twenty-eighth rule in bankruptcy the learned Judge said:

"Now I think the clear meaning of this rule is—the words 'severally on account of any bankrupt estate,' mean that the officer when he makes a deposit, must indicate, by the form of the

deposit, the account on which he makes it. He would not be complying with the rule to make the deposits generally to the credit of the District Court of the United States. He must indicate in the form of the deposit the account on which the deposit is made. If in a bankrupt's estate, he should say or have it said, upon the books of the bank or upon the book which he keeps, that it is on account of the bankrupt's estate, A, B, C, D or E. That construction is borne out by the fact that when a check is drawn it is required by the rule to state the date, sum and the account on which it is drawn. Now I think that the deposit book is to be regarded and to be understood as if there was an account to be kept with each one of these cases, in which a deposit is made—as if it read 'The State National Bank of Springfield in account with the United States District Court for the Southern District of Illinois, on account of case 2197, in the Bankrupt Court.' And all entries of deposits made in the case on one side, and all the checks drawn against that case put upon the other. And I think in conformity with this rule the bank was bound to take notice, as the account progressed from time to time, of how much was deposited in each case—how much was due from the bank in each case—as the checks were drawn from time to time. And this distinguishes these cases, in my judgment, from the case in the Supreme Court of United States referred to, where the deposits were made generally, in one case by a paymaster in the army and in the other by a United States Treasurer. Here the deposit is generally to the credit of the District Court of the United States—but not stopping there, is particularly on account of these cases mentioned in these checks. And I think that there was, on the part of the bank—both the bank and the court, and everybody in this country being parties in a sense to this order in bankruptcy made by the Supreme Court of the United States—and an implied promise on the part of the bank, not simply with the court, but with the court and with each one of the parties interested in the several cases, that it would hold that money on account of these cases—and the law implies a promise from the bank to every one who receives a check drawn in the modes prescribed by this rule, that it will honor that check and pay that check to the party holding it; and that being the case I think that the check-holders have the right to sue here—to sue in their own names. It is their money to which they are entitled under a promise from the bank that it will pay checks to them when presented."

If it be said that the bank had no actual notice of the existence of this 28th rule, the answer is that it was adopted by the Supreme Court by virtue of the laws of Congress, and is there-

fore of as much force and validity as if it had been an enactment of Congress, of which all persons and corporations must take notice.

We forbear the marshaling of authorities respecting the duties and obligations of those dealing with trust funds, but refer to Morse on Banks and Banking, page 40, in which the author uses the following language:

"If the same person keeps separate accounts at the same bank in distinct characters, the one being his individual account, and the other kept by him under any species of trust, if the bank has notice of the nature of the second account, it will be bound to keep the two distinct, even in spite of efforts on the part of the trustee himself to intermingle them, or to transfer funds from the trust account to his private account. If the bank permits him to make such transfers, it will be liable to reimburse the beneficiary or principal who has been robbed of his property; and if the customer has drawn out the fund so that his own account no longer furnishes means of remuneration to the bank, it will have no recourse but to bear the loss.

"The decision in this case, *Bodenham* v. *Hoskins*, 13 Eng., L. & Eq., 222, was based upon the ground that the banker had cognizance of the circumstances which rendered the conduct of the customers fraudulent; and so, though not, perhaps morally culpable, they were yet in the view of the law parties to the fraud."

This view of the law is not opposed by *National Bank* v. *Insurance Co.*, 104 U. S. 54, cited by plaintiff in error. In this last case the court, speaking of the lien of the bank, says:

"It attaches to such securities and funds, not only against the depositor, but against the unknown equities of all others in interest, unless modified or waived by some agreement, express or implied, or by conduct inconsistent with its assertion. But it cannot be permitted to prevail against the equity of the beneficial owner of which the bank has notice, either actual or constructive."

In conclusion, we submit that the acceptance by the bank of the appointment as a depository of court funds, made the bank

the trustee of such funds for the benefit of all persons having an interest therein. From the manner in which the account was kept, the deposits made and the checks drawn, the bank had ample notice that such funds were trust funds, and it was bound to hold every such fund for the special and sole benefit of the persons to whom such funds equitably belonged, and whenever it paid a check, it was bound to know that there were on deposit funds to the credit of the party in favor of whom the check was drawn.

Any other rule would impose an intolerable hardship on the creditors of bankrupt estates, and afford complete immunity for trustees, from financial responsibility on account of misappropriation of funds. At first the creditor was at the mercy of the court. It holds the funds to which he was entitled, and restrained every legal attempt to collect a debt. He could neither determine the place where the money should be deposited, nor direct the manner in which the accounts should be kept, and to say that he should be compelled to suffer on account of the negligence of the court, or any of its officers or appointees, is to announce a doctrine neither sanctioned by law, equity or morals.

Proper diligence would have informed the bank of the presentation of any check, whether or not there were at the time funds on deposit, out of which such check might lawfully be paid; and not having exercised such diligence, the loss must fall upon the bank, and not on the innocent creditor, who has been guilty of no negligence.

C. C. BROWN,
GEORGE HUNT,
Attorneys for Defendant in Error.